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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL HERNANDEZ GONZALEZ,

Plaintiff,

v.

THE FRESNO SHERIFF’S
DEPARTMENT, et al.,

Defendants.

Case No. 1:15-cv-01200-BAM (PC)

ORDER DISCHARGING ORDER TO SHOW
CAUSE (ECF No. 52)

ORDER REGARDING PLAINTIFF’S
MOTION TO DISMISS DEFENDANT
SCOTT FROM THIS LEGAL MATTER

(ECF No. 59)

Plaintiff Michael Hernandez Gonzalez (“Plaintiff”) was a pretrial detainee at the time of the incident and is currently a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

On December 18, 2017, following the filing of Plaintiff’s fourth amended complaint, the Court issued an order directing the United States Marshal to initiate service of process in this action upon Defendants Gutierrez, Scott, Palacios, and Nemoto. (ECF No. 46.) On January 8, 2018, the United States Marshal filed a return of service unexecuted as to Defendant Scott. (ECF No. 51.) The Marshal indicated that Defendant Scott is no longer employed by the Fresno County Jail, and no forwarding information was available. (Id.) Accordingly the Court issued an order for Plaintiff to provide the necessary information to identify and locate Defendant Scott, or to show cause why Defendant Scott should not be dismissed from this action. (ECF No. 52.)

On January 24, 2018, Plaintiff filed a document entitled “Order to Dismiss Defendant Scott from this Legal Matter.” (ECF No. 59.) Plaintiff states that he is not able to provide the U.S. Marshal with more accurate or sufficient information to serve Defendant Scott with the

1 summons and complaint, and therefore requests that Defendant Scott be dismissed. (Id.) The
2 Court construes Plaintiff's filing as a request for voluntary dismissal of Defendant Scott pursuant
3 to Federal Rule of Civil Procedure 41(a).

4 "[U]nder Rule 41(a)(1)(i), a plaintiff has an absolute right to voluntarily dismiss his action
5 prior to service by the defendant of an answer or a motion for summary judgment." Commercial
6 Space Mgmt. Co., Inc. v. Boeing Co., Inc., 193 F.3d 1074, 1077 (9th Cir. 1999) (quotation and
7 citation omitted). "A plaintiff may dismiss some or all of the defendants, or some or all of his
8 claims, through a Rule 41(a)(1) notice. The filing of a notice of voluntary dismissal with the court
9 automatically terminates the action as to the defendants who are the subjects of the notice."
10 Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997) (internal citations omitted). "[A]
11 dismissal under Rule 41(a)(1) is effective on filing, no court order is required, the parties are left
12 as though no action had been brought, the defendant can't complain, and the district court lacks
13 jurisdiction to do anything about it." Commercial Space Mgmt., 193 F.3d at 1078.

14 Defendant Scott has not been served in this action and no defendant has filed an answer or
15 motion for summary judgment.

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. The Court's January 10, 2018 show cause order, (ECF No. 52), is DISCHARGED;
- 18 2. In light of Plaintiff's voluntary dismissal, Defendant Scott is dismissed from this
19 action by operation of law pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i);
- 20 3. The Clerk of the Court is DIRECTED to terminate this defendant on the docket; and
- 21 4. This action will proceed against the remaining defendants.

22
23 IT IS SO ORDERED.

24 Dated: January 26, 2018

/s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE